No. 83-1753

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

DORA JANE HORTON,
Administratrix with Will Annexed of the Estate of
J. W. EHRLICH, et al.,
Petitioner,

VS.

CITY AND COUNTY OF SAN FRANCISCO, THE STATE OF CALIFORNIA, THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN FRANCISCO, BYRON ARNOLD,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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Respondents City and County of San Francisco and Byron Arnold file this Brief in Opposition to the Petition for a Writ of Certiorari and pray that the Writ be denied.

STATEMENT OF THE CASE

Petitioner claims that she is entitled to recover damages from a Superior Court trial judge for an alleged error in law. The trial court dismissed her claims and the Court of Appeal affirmed. The California Supreme Court denied her Petition for Hearing. Petitioner now seeks review in this Court on a point which has been a settled

part of the common law since before this country was founded.

Petitioner is the administratrix of the estate of J. W. "Jake" Ehrlich, who died in 1971. When the petition for probate was filed, Respondent Byron Arnold was a Superior Court judge in and for the City and County of San Francisco. Judge Arnold set the bond for the Executor at $100,000. Thereafter, in 1978 the Executor was removed and a judgment returned against him in an amount in excess of the bond. The Petitioner then sued the City and County of San Francisco and the State of California for the excess of the judgment over the bond. It was not until much later that the Petitioner served Judge Arnold as a Doe defendant.

Petitioner's case rests upon the premise that Judge Arnold erred in failing to set the Executor's bond at $300,000 (the purported full value of the estate) in compliance with California Probate Code Section 541. Had the bond been higher, Petitioner contends, there would have been ample funds to satisfy the judgment against the Executor. Since it evidently was not high enough, Petitioner argues that Judge Arnold (and his employers) should pay the difference.

The trial court rejected the Petitioner's claims. The City and County of San Francisco and the Superior Court successfully demurred to the Complaint and the State of California's motion for judgment on the pleadings was granted. The trial court also granted Judge Arnold's motion to quash service of process. The Court of Appeal affirmed in an unpublished opinion. Petitioner's Petition

for Hearing was summarily denied by the California Supreme Court.[1]

REASONS WHY CERTIORARI SHOULD BE DENIED

Petitioner fails to satisfy any of the provisions of Rule 17.1 of the Rules of the Supreme Court, governing review on certiorari. A reading of that rule compels the conclusion that subsections (a) and (b) have no application herein. Petitioner does not contend that a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals. Nor does this case involve a decision by a federal court of appeals.

The only remaining basis for review in this Court, Rule 17.1, subsection (c), is also inapplicable herein. Petitioner argues that the grant of absolute immunity to trial court judges, even in situations where the judge is alleged to have contravened the law, constitutes a denial of equal protection. This argument is untenable.

Few doctrines are more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction. *See Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872). As recently as this Term, the Court, in *Pulliam v. Allen,* 44 S.Ct. Bull. (CCH) p. B2658 (U.S. May 14, 1984) (No. 82-1432), reaffirmed that judges enjoy absolute immunity from civil suits for damages, while holding that

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[1]Respondents have, for reasons of consistency, followed Petitioner's nomenclature, but the Writ should have been directed to the Court of Appeal. *Adam v. Saenger,* 303 U.S. 59, 61, 58 S.Ct. 454, 82 L.Ed. 649 (1938).

judicial immunity is not a bar to prospective injunctive relief or an award of attorney's fees against a judicial officer.

The equal protection clause does not mean that a state may not draw lines that treat one class of individuals or entities different from others; the test is whether the difference in treatment is an invidious discrimination. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973), rehearing denied 411 U.S. 910, 93 S.Ct. 1523, 36 L.Ed.2d 200 (1973). There are no allegations herein of infringement of a fundamental right or use of a suspect classification. *See Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

The crucial question in equal protection cases is whether there is an appropriate governmental interest suitably furthered by the differential treatment. *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). The doctrine of judicial immunity "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), quoting *Bradley v. Fisher, supra.*

The principle of judicial immunity extends to actions brought under the Civil Rights Act (42 U.S.C. § 1983). *Pierson v. Ray, supra.* Petitioner's reliance on *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), is misplaced. *O'Shea* spoke only to the issue of criminal liability under the Civil Rights Act, and clearly dis-

tinguished the concept of judicial immunity for civil damages. *O'Shea v. Littleton, supra,* 414 U.S. at 503.

Judicial immunity "is dependent on the challenged conduct being an official judicial act within [the judge's] statutory jurisdiction, *broadly construed.*" [Emphasis added.] *Dennis v. Sparks,* 449 U.S. 24, 29, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). In reviewing a claim of judicial immunity, the Court must distinguish between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. *Bradley v. Fisher, supra.* Jurisdiction is to be construed broadly under the judicial immunity doctrine so that a judge will not be held liable unless he acts without color of authority. *Apton v. Wilson,* 506 F.2d 83, 90 (D.C. Cir. 1974). The policy underlying the doctrine requires that its application not depend on the determination of "nice questions of jurisdiction." *Williams v. Sepe,* 487 F.2d 913, 914 (5th Cir. 1973).

The cases cited by Petitioner for the proposition that judicial immunity does not attach to non-judicial acts concern administrative functions of judges outside of the courtroom. *Ex parte Virginia,* 100 U.S. (10 Otto) 339, 25 L.Ed. 676 (1880), addressed the criminal liability of judges, which is not at issue herein. In *Shore v. Howard,* 414 F.Supp. 379 (N.D. Tex. 1976), the judges were held to be not immune, when sued in their capacity as the ultimate employers of the defendant probation officers. Similarly, in *Padgett v. Stein,* 406 F.Supp. 287 (M.D. Penn. 1975), the judges were not protected when they were sued in their executive capacity as members of the county prison board. And in *Doe v. County of Lake,* 399 F.Supp. 553 (N.D. Ind.

1975), the court held that plaintiffs could bring a suit for damages against the defendant judges based upon the administrative duties of the judges with regard to management of the county juvenile detention center. None of these cases involved the conduct of judges acting in their judicial capacity, rather than as employers or managers.

Judge Arnold was not acting in an administrative or executive role when he set the bond for the Ehrlich estate. He was acting as a judicial officer, just as he would have been in setting bail or computing a minimum term for a criminal offense under California's determinate sentencing statutes. Assuming he erred in setting the executor's bond, still the error was a judicial one. *See Cole v. Hartford Accident and Indemnity Co.*, 379 F.Supp. 1265 (M.D. Ala. 1974) (holding that determination of the sufficiency of a proffered surety is a judicial act for purposes of determining judicial immunity).

This Court has held that, for the purposes of judicial immunity, the factors determining whether an act by a judge is "judicial" relate to the nature of the act itself (whether it is a function normally performed by a judge) and the expectation of the parties (whether they dealt with the judge in his judicial capacity). *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978), rehearing denied 436 U.S. 951, 98 S.Ct. 2862, 56 L.Ed.2d 795 (1978). In *Stump*, the Court upheld the application of judicial immunity to a local judge who authorized the sterilization of a minor girl upon the mother's

ex parte application, without any hearing, any guardian *ad litem* or any statutory authority.

Judge Arnold was fulfilling herein a function normally performed by a judge; California Probate Code Section 541, subd. (a), provides in relevant part that the bond is "to be approved by a judge of the superior court." The parties came before Judge Arnold and the bond was submitted to him for that reason; he was clearly acting in his judicial capacity. The Probate Code clearly gave him jurisdiction over the subject matter.

In light of the broad construction of jurisdiction favored in *Dennis v. Sparks, supra,* and the distinction between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter set forth in *Bradley v. Fisher, supra,* Respondents City and County of San Francisco and Byron Arnold respectfully submit that Judge Arnold is entitled to judicial immunity for the act complained of herein. Judicial immunity is a concomitant of the independent judiciary indispensable to the well-being of a free people. *O'Bryan v. Chandler,* 352 F.2d 987 (10th Cir. 1965), cert. denied 384 U.S. 926, 86 S.Ct. 1444, 16 L.Ed.2d 530 (1966), rehearing denied 385 U.S. 889, 87 S.Ct. 13, 17 L.Ed.2d 123 (1966).

CONCLUSION

For the reasons set forth above, Respondents City and County of San Francisco and Byron Arnold respectfully submit that the Petition for a Writ of Certiorari should be denied.

DATED: May 25, 1984

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